



POLICE DEPARTMENT

November 24, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Daniel Jennings
Tax Registry No. 930416
110 Precinct
Disciplinary Case No. 2014-11553

Detective Jeffrey Arceo
Tax Registry No. 945475
Warrant Section
Disciplinary Case No. 2013-10309

Sergeant John Musante
Tax Registry No. 934019
83 Precinct
Disciplinary Case Nos. 2013-10310 & 2014-11554

Sergeant Michael Lazarou
Tax Registry No. 936922
13 Precinct
Disciplinary Case No. 2014-11557

Sergeant Siu Lam
Tax Registry No. 935153
Emergency Service Unit
Disciplinary Case No. 2014-11559

The above-named members of the Department appeared before me on September 23 and 24, 2015, charged with the following:

Disciplinary Case No. 2014-11553

1. Said Police Officer Daniel Jennings, assigned to the 110th Precinct, while on duty on or about November 18, 2012, at approximately 0230 hours, in the vicinity of Whitney Avenue and Hampton Street, in Queens County, engaged in conduct prejudicial

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to the good order, efficiency or discipline of the New York City Police Department, in that he searched Kelvin Cerdas vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

2. Said Police Officer Daniel Jennings, assigned to the 110th Precinct, while on duty on or about November 18, 2012, at approximately 0230 hours, in the vicinity of Whitney Avenue and Hampton Street, in Queens County, abused his authority as a member of the New York City Police Department in that he frisked Kelvin Cerdas vehicle without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 - STOP AND FRISK

Disciplinary Case No. 2013 10309

1. Said Police Officer Jeffery Arceo, on or about May 2, 2012, at approximately 2010 hours, while assigned to the 110th Precinct and on duty, in the vicinity of Penrod Street and Westside Avenue, Queens County, was discourteous to Person B.

P.G. 203-09, Page 1, Paragraph 2 - PUBLIC CONTACT – GENERAL

2. Said Police Officer Jeffery Arceo, on or about May 2, 2012, at approximately 2010 hours, while assigned to the 110th Precinct and on duty, in the vicinity of Penrod Street and Westside Avenue, Queens County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened Person B with the use of force without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Disciplinary Case No. 2013-10310

1. Said P.O. John Musante, on or about May 2, 2012, at approximately 2010 hours, while assigned to the 110th Precinct and on duty, in the vicinity of Penrod Street and Westside Avenue, Queens County, abused his authority as a member of the New York City Police Department in that he frisked Person B without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 - STOP AND FRISK

Disciplinary Case No. 2014-11554

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1. Said Police Officer John Musante, assigned to the 110th Precinct, while on duty on or about November 30, 2012, at approximately 0245 hours, in the vicinity of the junction of the Long Island Expressway and the Van Wyck Expressway, in Queens County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched Kelvin Cerdas vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

2. Said Police Officer John Musante, assigned to the 110th Precinct, while on duty on or about February 7, 2013, at approximately 0100 hours, in the vicinity of Lamont Avenue and Elbertson Street, in Queens County, abused his authority as a member of the New York City Police Department in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 - STOP AND FRISK

3. Said Police Officer John Musante, assigned to the 110th Precinct, while on duty on or about February 7, 2013, at approximately 0100 hours, in the vicinity of Lamont Avenue and Elbertson Street, in Queens County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched Person A's vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Disciplinary Case No. 2014-11557

1. Said Police Officer Michael Lazarou, assigned to the 110th Precinct, while on duty on or about November 18, 2012, at approximately 0230 hours, in the vicinity of Whitney Avenue and Hampton Street, in Queens County, abused his authority as a member of the New York City Police Department in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 - STOP AND FRISK

Disciplinary Case No. 2014-11559

1. Said Sergeant Siu Lam, on or about February 7, 2013, at approximately 0100 hours, while assigned to the 110th Precinct and on duty, in the vicinity of Lamont Avenue and Elbertson Street, Queens County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police department, in that he participated in the stop of Person A's vehicle without sufficient legal authority.

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P.G. 203-10 Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

The Civilian Complaint Review Board (CCRB) was represented by Nicole Junior, Esq., Respondents Jennings and Musante was represented by Craig Hayes, Esq., Respondent Arceo was represented by Michael Lacondi, Esq., and Respondents Lazarou and Lam were represented by Matthew Schieffer, Esq. CCRB called Kelvin Cerda and Miguel Castillo as witnesses. Each Respondent testified on his own behalf.

Respondents through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2014-11553

Respondent Jennings is found Not Guilty of Specification 1 and Guilty of Specification 2.

Disciplinary Case No. 2013-10309

Respondent Arceo is found Not Guilty.

Disciplinary Case Nos. 2013-10310 & 2014-11554

Respondent Musante is found Guilty of Specifications 1, 2 and 3 in case 2014-11554. He is found Not Guilty of Specification 1 in case 2013-10310.

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Respondent Lazarou is found Guilty.

Disciplinary Case No. 2014-11559

Respondent Lam is found Not Guilty.

EVIDENCE AND ANALYSIS

In this case, there are five members of service charged with nine separate specifications which arise out of four incidents. I have chosen to analyze the case in chronological order by date of incident as the most logical way to approach the charges.

May 2, 2012 (Case Nos. 2014-10309, 2013-10310)

Evidence

On May 2, 2012, Respondent Musante and Respondent Arceo were assigned to the 110 precinct and were working together at approximately 8 PM in the vicinity of Penrod Street and Westside Avenue in Queens. They were assigned to Anti-Crime and were patrolling in plainclothes in an unmarked car. Sergeant DeSiervi was riding with them as their supervisor. They observed Person B urinating in public, stopped their car, and approached him. After that point, there are different versions of what occurred.

According to testimony from Sgt. DeSiervi, he and Respondent Arceo approached Person B and stopped him. DeSiervi detected a strong smell of marijuana. At this point, DeSiervi did not hear Respondent Arceo call Person B an asshole. As Person B was complying with Respondent Arceo, DeSiervi looked around the area for any signs of drug use or drug paraphernalia. (Tr. 375). Arceo remained with Person B and obtained an ID

card from him. Sgt. DeSiervi asked Respondent Musante to go back to their car and run the ID to check for warrants, which Respondent Musante did. (Tr. 375-76). At some point, DeSiervi heard the voices of Person B and Respondent Arceo and then turned and saw Person B pushing his arms in an upward motion near Respondent Arceo's face and head area. Respondent Arceo backed up and Person B ran away. (Tr. 376). Sgt. DeSiervi couldn't make out what, if anything, had been said. (Tr. 385).

Person B started to run and Respondent Arceo and DeSiervi chased him. The two of them caught him, arrested him, handcuffed him, and brought him back to the 110 precinct. (Tr. 376-78). Sgt. DeSiervi testified that at no time did he witness or hear any courtesy or threats of force from Arceo towards Person B. (Tr. 378-79). Nor did he see Respondent Arceo strike Person B. (Tr. 380). DeSiervi did not see anyone frisk Person B that evening. (Tr. 388).

Respondent Arceo testified at trial. According to his account when he initially approached Person B, he asked him what he was doing and then let him finish urinating. (Tr. 405). Person B then immediately started to get on the phone and speak to someone. (Tr. 405). Respondent Arceo stated that he told Person B to get off the phone at least four or five times. (Tr. 406). According to Respondent Arceo, Person B became a "little irate and angry" and said, "what the fuck for?" and "I don't have to get off the phone." (Tr. 407). When Person B refused to get off the phone and started backing away, Respondent Arceo got a hold of his wrist to place him under arrest. Person B continued to move away and when Respondent Arceo tried to grab his wrist again, Person B put his hands up in a fighting stance and took a swing towards the left side of Respondent Arceo's face. (Tr. 408). Respondent Arceo moved back and was not hit. Person B put his hands up again and

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then just turned and ran. (Tr. 408). Respondent Arceo and DeSiervi chased Person B and caught him and after a struggle cuffed him and brought him back to the 110 Precinct. (Tr. 409-410).

Respondent Arceo testified that he was never discourteous to Person B. He did not curse at him, threaten to beat the shit out of him, threaten him with any force, attempt to knee him in the groin, or strike Person B. (Tr. 411-12). He also testified he did not see Respondent Musante frisk Person B. (Tr. 412).

Respondent Musante also testified at trial. He stated that his entire involvement in this incident consisted of receiving Person B's ID from DeSiervi and then returning to their vehicle to run the ID to check for warrants. (Tr. 430). While he was in the car, he heard yelling, looked up and saw Person B running away from Respondent Arceo and Sgt. DeSiervi. (Tr. 432). He got out of the vehicle and ran too but by the time he caught up, Respondent Arceo and DeSiervi had handcuffed Person B. (Tr. 433). Musante testified he never frisked Person B during any point in the entire encounter. He also did not observe anyone else frisk Person B. (Tr. 433).

Person B, despite being subpoenaed by CCRB, did not appear to testify at trial. A transcript from his interview with a CCRB investigator, along with a transcript of his mother's interview, were presented as evidence. In Person B's statement, he said that while he was urinating, he heard someone say, "Hey, asshole, what are you doing?" and he then turned around and saw undercover cops. (CCRB Ex. 8B, 4). He told them he was just peeing and they approached and patted him down on his legs, waist and shoulders. (CCRB Ex. 8B, 5). While one officer went to check his ID, he called his mother and while he was talking to her, Respondent Arceo said, "Oh, you want me to beat the shit

out of you? ...Hang up the fucking phone before I beat the shit out of you." (CCRB Ex. 8B, 6). Person B told the CCRB that he said he wasn't doing anything wrong and asked Respondent Arceo if he wanted to speak to Person B's mother. Person B contends that Respondent Arceo then came towards him, tried to knee him, which caused Person B to drop his phone, and then punched him in the face. (CCRB Ex. 8B, 6). According to Person B the officers then grabbed him, handcuffed him and put him in the car. (CCRB Ex. 8B, 6).

Person B's mother, who also was subpoenaed by CCRB, did not appear to testify. She did submit for a live interview with a CCRB investigator on June 1, 2012. In her interview, she said she was on the phone with her son on May 2, 2012, at about 8 PM when she heard someone screaming, "Hang up the fucking phone now. Do you want me to beat the fucking shit out of you right now." She said she heard her son say he was talking to his mother and then the exact words, "Do you want me to beat the shit out of you?" (CCRB Ex. 9B, 4, 12). She heard her son say he wasn't doing anything wrong before the call became disconnected. (CCRB Ex. 9, 13-14).

Analysis

Respondent Musante is charged with improperly frisking Person B and Respondent Arceo is charged with being discourteous to Person B and threatening Person B with use of force without sufficient authority. I find Respondents Arceo and Musante Not Guilty of the three charges stemming from this incident.

The burden of proof lies with the CCRB and they must prove that Respondents are guilty of the specifications by a preponderance of the credible evidence. I find that

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they have not met this burden on these three charges pertaining to the May 2, 2012

incident.

CCRB relies entirely on hearsay evidence to meet its burden. Hearsay evidence is acceptable as evidence in this proceeding and in fact may be the basis in certain situations for a decision. However, great caution must be taken before relying on hearsay witness statements since that witness is not subject to observation by the trier of fact as he or she is relating their account of what happened and also, he or she has not had their account tested under the rigors of cross-examination. I do not find that Person B's out of court statement to the CCRB holds up to the heightened scrutiny that must be applied when evaluating such evidence.

Person B's hearsay statement contains an account of Respondent Arceos's behavior that seems very unlikely. If Person B's version of the events is to be believed, he was completely compliant with the officers and was simply on the phone with his mother when Respondent Arceo yelled at Person B to put the phone down, then "came at" him, tried to knee him and then actually punched him in the face. It is noted that neither of the Respondents was charged with hitting Person B. Person B's exaggeration of what took place calls his entire hearsay statement into question.

CCRB points to Person B's mother as a corroborating witness. Though Person B's mother may have heard some of what was going on via phone, her statement, which supports her son's account almost verbatim, is unreliable for multiple reasons. First, she was not present and did not observe anything firsthand. Second, it is doubtful that the entire encounter would have been perfectly audible over the phone. Further, as the

complainant's mother, it is only natural that she would corroborate her son's story. For these reasons the probative value of her interview is negligible at best.

In contrast to the hearsay statements, I found the three members of service who testified to be credible in their account of what happened. Respondent Musante, in a straightforward manner, denied that he frisked Person B. Neither Respondent Arceo nor Sgt. DeSiervi saw him conduct any frisk either. By all of their accounts, Respondent Musante was simply tasked with checking Person B's ID in the computer located inside their car.

In addition, Respondent Arceo also testified in a credible manner, based on his answers and general demeanor, that he was not discourteous to Person B and did not threaten him with force. While Respondent Musante and Sgt. DeSiervi were not always in close proximity to Respondent Arceo during the incident, they testified that they did not hear him threatening the use of force or being discourteous to Person B at the times they were in his presence.

Having credited the testimony of the three officers present during the incident and having no probative evidence supporting Person B's hearsay claims, I find Respondent Arceo Not Guilty of (i) courtesy toward Person B and (ii) threatening Person B with the use of force without sufficient legal authority. I further find Respondent Musante Not Guilty of an improper frisk.

November 18, 2012 (Case Nos. 2014-11553, 2014-11557)

It is undisputed that on November 18, 2012, at approximately 2:30 AM, Respondents Sergeant Lazarou and Police Officer Jennings were assigned to Anti-Crime

patrol and were in plain clothes in an unmarked car near Whitney Avenue and Hampton Street in Queens. At that same approximate time and place, Kelvin Cerda was driving his car with his brother Person A seated in the rear drivers side seat and a friend named Jennifer Peña in the front passenger seat. The car, which had tinted windows, was stopped by the Respondents. After exiting the car, both Kelvin Cerda and Person A were frisked. A knife was recovered from the glove compartment and Kelvin Cerda was placed under arrest and charged with criminal possession of a weapon. (Tr. 158-60). He ultimately pled guilty to disorderly conduct. (Tr. 108).

Respondent Jennings is charged with wrongfully frisking Kelvin Cerda and wrongfully searching his vehicle. Respondent Lazarou is charged with wrongfully frisking Person A. It is not disputed that the frisks and a search took place. In dispute is whether Respondents were legally justified in doing so.

According to Kelvin Cerda, who testified at trial, he was driving his vehicle at the speed limit that night but pulled his vehicle over when he heard sirens and saw flashing lights on the vehicle behind him. He stated that three officers, including Respondent Jennings and Respondent Musante¹, approached his car and Respondent Jennings ordered him to get out of his vehicle. (Tr. 57-61). He testified that he left his keys in the ignition, immediately got out of his car and went to the rear of his car as ordered.

Kelvin Cerda asserted that he was then put in handcuffs and directed by Respondent Jennings not to look towards his car. (Tr. 63-65). Person A and Jennifer were also ordered out of the car and Kelvin turned his head and saw the car being searched.

¹ During the course of the trial, it was revealed that Respondent Musante was actually on vacation on the date in question and did not, in any way, take part in this vehicle stop.

(Tr. 65, 67). He observed Respondent Musante and Respondent Jennings searching the front side of the vehicle. He saw one officer search the glove compartment, which had been locked and closed when he exited the car. He agreed that a "small blade" that he said he used at work was found by Respondent Musante. (Tr. 98). He contended that he had not given anyone permission to enter the glove compartment box. (Tr. 68). Kelvin further testified that he saw the officers open and subsequently search the trunk of his car and noted he had not given them permission to do so. (Tr. 69-70).

Person A did not testify at trial. His statement to CCRB was admitted into evidence. In his interview, he described being in the car with Kelvin and Jennifer and being stopped by three officers. Person A stated that while two officers were standing with him, his brother and Jennifer at the rear of their car, a third officer searched the car. (CCRB Ex. 1B, 13). He further noted that the trunk was searched but he did not know who opened the trunk. (CCRB Ex. 1B, 18). He said that the gravity knife was recovered from either the glove compartment or the trunk, which he asserted were both locked. (CCRB Ex. 1B, 19). He also indicated that the officer that he described as the "Spanish officer" patted him down, searched his private areas and then went into his pockets. (CCRB Ex. 1B, 20-22).

Both Respondents Jennings and Lazarou testified about the evening of November 18, 2012. Respondent Jennings described the area of Whitney Avenue and Hampton Street in Queens as a high crime area with narcotic trafficking, gang activity, and police-involved shootings. (Tr. 151). He stated that they stopped Kelvin Cerda's vehicle because it had a broken passenger's side headlight and because the dark non-transparent tinted windows were partially open on a cold evening, which, in his experience, can often

indicate the driver is intoxicated or the occupants are trying to eliminate the odor of narcotics. (Tr. 152-53).

Respondent Jennings testified that he saw Kelvin Cerda slouch down in the front seat as he was approaching the car and also noticed a "strong odor" of marijuana coming from the vehicle. (Tr. 155). He recalled asking Kelvin Cerda if he had been smoking and Kelvin indicating that he had been smoking earlier in the day. (Tr. 156). However, Respondent Jennings asserted that the smell was so strong that he believed marijuana had been smoked recently. (Tr. 174). As a result of this admission, Respondent Jennings asked Kelvin Cerda to exit the car which he did. Respondent Jennings then "did a pat-down for weapons for my safety." He patted down the waist area, chest area and down the legs. (Tr. 157).

On cross-examination, Respondent Jennings acknowledged that at the time he patted him down, Kelvin Cerda did not appear to have any weapons on him. (Tr. 175-76). When asked by this tribunal to articulate his safety concerns at the time of the frisk he testified, "Well, in that the motorist had stated that he smoked marijuana before. I don't know who this motorist is. He's in a ---stopped in a high-crime area. I asked him to step out of the vehicle. I don't know if he has a weapon, you know, on his person. I don't know who this person is." (Tr. 192).

After the frisk, Respondent Jennings asked Kelvin Cerda to step to the rear of the car. (Tr. 157). Respondent Jennings testified that when all three occupants were out of the car, he searched the vehicle, including the glove compartment, back seat, and center console, and found a gravity knife and a prescription pill container inside the glove compartment box. (Tr. 157-58). He admitted to opening the glove compartment to

search it. (Tr. 180). He stated that his reasons for searching were the strong odor of marijuana and Cerda's admission that he had been smoking earlier in the day. (Tr. 177-78). He then went to the rear of the vehicle, placed handcuffs on Kelvin Cerda and placed him under arrest for criminal possession of a weapon. (Tr. 159-60).

Respondent Lazarou testified that he approached the passenger side of Kelvin Cerda's stopped car. He also recalled a "strong odor of marijuana emanating from the vehicle" and remembered that Person A told him that he had smoked marijuana earlier. At that point, he asked Person A to step out of the car. (Tr. 199, 204).

He further testified, "I saw a bulge in his pocket. And again, being -- with the car stops being -- you never know what's going to happen, I believed that he may have a weapon on him. I was in fear for my safety so I patted the area where I saw the bulge. (Tr. 199). Respondent Lazarou admitted on cross-examination that when he first saw the bulge he couldn't identify what it was and acquiesced that it could have been anything such as a deck of cards or a pack of cigarettes. He was not able to tell the shape of the bulge or the material of the bulge and he "couldn't say it looked like anything." (Tr. 205-06). After he patted down the area it became apparent to Respondent Lazarou that it was a cell phone in Person A's pocket and he just asked Person A to move to the rear of the car. (Tr. 200).

Analysis

Respondent Lazarou admitted to conducting a frisk of Person A and Respondent Jennings admitted to frisking Kelvin Cerda. Because this tribunal finds that Respondents had no legal basis justifying the frisks, they are both found Guilty of improper frisks.

Reasonable suspicion that a suspect is armed and dangerous is required for a frisk, even when the initial stop is justified. That suspicion can be unparticularized if the stop is for a violent crime, like robbery. This also includes situations when the officer observes something on the person that he or she reasonably suspects is a weapon. Here, there is no allegation or charge that the stop was unlawful. Still, because the stop was undisputedly not related to any violent crime, Respondents needed an independent, reasonable belief of immediate danger in order to justify frisking Kelvin and Person A. See *People v. Mack*, 26 N.Y.2d 311, 317 (1970); Patrol Guide § 212-11; Legal Bureau Bulletin, Vol. 1, No. 3, p. 3 (Mar. 31, 1971).

In this case, Respondent Lazarou did not have sufficient reason to believe that Person A was armed and dangerous based on any of Person A's actions or based on any other information that Respondent Lazarou had prior to the frisk. It does not follow that Respondent's suspicion that Person A may have recently smoked marijuana created reasonable suspicion that he was armed and dangerous. He also did not have reasonable suspicion to believe that what he described as a bulge was in fact a weapon. He acknowledged it could have been something as innocuous as a deck of cards. An officer cannot pat down every bulge they see unless they have additional reasons to reasonably suspect that bulge is indeed a weapon. Since that was not the case here, I find Respondent Lazarou Guilty of frisking Person A without sufficient legal authority.

Similarly, Respondent Jennings did not have sufficient reason to believe Kelvin Cerda was armed and dangerous at the time of the frisk. Respondent Jennings very clearly stated that at the time of the frisk, Kelvin Cerda did not appear to have any weapons on him. The facts that the stop occurred in a high crime area, that Respondent

Jennings didn't know Kelvin Cerda, and that Kelvin Cerda said he smoked marijuana earlier neither independently nor collectively gave Respondent Jennings sufficient legal authority to frisk Kelvin Cerda. I therefore find him Guilty of the unlawful frisk.

Respondent Jennings is also charged with searching Kelvin Cerda's vehicle without sufficient legal authority. While he admitted to searching the vehicle at trial, I find him Not Guilty of an improper search for the following reasons.

It is well-settled law in New York that the odor of marijuana emanating from a vehicle, when detected by police officers qualified to recognize it by virtue of their training and experience, creates probable cause to search the vehicle for drugs. *People v. Acevedo*, 118 A.D.3d 1103 (3d Dep't 2014); *People v. Badger*, 52 A.D.3d 231 (1st Dep't 2008), citing *People v Chestnut*, 43 A.D.2d 260, 261-62 (1974). Respondents Lazarou and Jennings both testified there was a "strong odor" of marijuana emanating from the vehicle. Both recalled inquiring about whether the vehicle occupants had been smoking marijuana. The officers' testimony was both candid and consistent throughout trial. For example, neither Respondent denied the frisks with which they were charged. Further, Respondent Jennings was forthright in describing the various areas of the car that he searched.

The CCRB prosecutor asserted that the marijuana odor was a fabricated story and noted that no marijuana was ever found in the car. Still, it remains the CCRB's burden to prove the search was unlawful. Just because no marijuana was found in the car does not mean that a strong odor of marijuana was not emanating from the vehicle. Because the CCRB has presented insufficient evidence to discredit the Respondents' contention that the vehicle was lawfully searched due to detection of a strong marijuana odor,

Respondent Jennings is found Not Guilty of unlawful search, as set forth in Specification

2.

November 30, 2012 (Case Nos. 2014-11554)

On November 30, 2012, it is undisputed that Police Officer Jennings and Respondent Musante were assigned to Anti-Crime and were patrolling in plain clothes in an unmarked car at approximately 2:45 AM. They stopped a vehicle driven by Kelvin Cerda in the vicinity of the Long Island Expressway and the Van Wyck Expressway. Respondent Musante had Mr. Cerda exit the car, placed him in handcuffs and arrested him. Respondent Musante searched the car. During the stop, Person A and Miguel Castillo arrived at the scene of the stop and walked over to Kelvin Cerda's vehicle. Mr. Cerda was ultimately charged with reckless driving, reckless endangerment, criminal possession of a weapon in the fourth degree, and criminal possession of a controlled substance in the seventh degree. (Tr. 257).

According to Respondent Musante and Jennings, prior to stopping Mr. Cerda's vehicle, they observed him driving a vehicle with a defective headlight at a very high rate of speed. (Tr. 163, 248). While they were following him on the LIE, both Musante and Jennings testified that Mr. Cerda was weaving in and out of traffic and was going at least 105 mph.(Tr. 185, 250). The officers slowed down but kept Mr. Cerda's vehicle in sight until they were able to stop him by activating their lights and sirens. (Tr. 251).

Respondent Musante, having already decided he was going to arrest Mr. Cerda for reckless driving and reckless endangerment, immediately placed Mr. Cerda in handcuffs upon his exit from the vehicle. (Tr. 252-53).

Respondent Musante testified that he noticed a "strong odor of marijuana" when the car door opened. He brought Mr. Cerda to the rear of the car and had Officer Jennings secure him. (Tr. 252). When he then returned to the driver's side of the vehicle, he also noticed a pill bottle on the passenger seat. (Tr. 253). Respondent Musante explained that he then decided to search the car based on, "his reckless driving, trying to get away, possibly the car was stolen, when he stepped out of the vehicle when I decided to place him under arrest the strong odor of marijuana, including the observation of the pills on the passenger seat." (Tr. 254). He asserted that he searched "everything" in the car including the glove box and center console, which were closed, and he also searched the trunk, which had been closed. (Tr. 254-55, 304- 305). He acquiesced that no marijuana was discovered but he found OxyContin pills with the name [REDACTED] on the label as well as a gravity knife in the trunk. (Tr. 255)². Mr. Cerda was charged with reckless driving, reckless endangerment, criminal possession of a weapon in the fourth degree, and criminal possession of a controlled substance in the seventh degree. (Tr. 257).

Kelvin Cerda testified that he saw Respondent Musante search his car and the trunk and that he never gave him authority to do so. (Tr. 80, 83-84). He estimated Respondent Musante searched front area of his vehicle for ten minutes, searched the backseat area for another ten minutes and then searched the trunk for twenty minutes. (Tr. 85-86). He further testified that the pill bottle was in his glove compartment. (Tr. 91). He stated that it was his prescription medication he took after a car accident he had a few

² Kelvin Cerda testified that [REDACTED] is the mother of his daughter. (Tr. 93).

months prior to the car stop. (Tr. 91). Cerdá acknowledged that Musante found an "old blade" in his trunk. (Tr. 86-87).

Miguel Castillo testified that while he was driving, he saw Kelvin's car after it was stopped by the police and he approached the scene with Person A on foot. (Tr. 133-34). He testified he saw an officer inside Kelvin Cerdá's car and moving items in the trunk of the car. (Tr. 140).

Analysis

There is no dispute that Respondent Musante searched all areas of Kelvin Cerdá's vehicle, including the trunk. In dispute is whether he had sufficient legal justification to do so.

As outlined above, is well-settled law in New York that that the odor of marijuana emanating from a vehicle, when detected by police officers qualified to recognize it by virtue of their training and experience, creates probable cause to search the vehicle for drugs. *Chestnut*, 43 A.D.2d 260, *Acevedo*, 118 A.D.3d 1103; *Badger*, 52 A.D.3d 231. Respondent Musante testified that he detected a "strong odor" of marijuana emanating from the vehicle. However, unlike the Respondents in the separate November 18 incident discussed above, Respondent Musante did not recall having any dialogue with Cerdá about the smell of marijuana. Jennings, his partner in arresting Cerdá, did not testify to noticing an odor of marijuana on this date and the arrest report makes no mention of it. It is difficult to believe that Respondent Musante would not have asked Cerdá about a strong smell of marijuana coming from the car. Without any testimony or evidence corroborating Musante's statement regarding the marijuana odor, unlike with the

November 18 incident, I cannot credit his testimony that he smelled marijuana emanating from the vehicle.

The pill bottle also does not provide sufficient probable cause for a search, particularly one that spanned the trunk, glove compartment and console, as was the case here. A labeled pill bottle is not inherently suspicious or threatening and there was no testimony that Respondent Musante was able to immediately identify the pills as a controlled substance. It is also highly doubtful that he could have been able, from his initial vantage point, to determine that the label on the pills indicated the name of an individual not present in the car. Further, in his initial CCRB interview, Respondent Musante agreed that Cerda did not appear to be "under the influence of anything." (Tr. 299). As such, I find that there was no reasonable basis for Respondent to determine the pill bottle was evidence of criminality or contraband, and thus it could not serve as the sole basis for probable cause for the search. See *People v. Carbone*, 184 A.D.2d 648 (2d Dep't 1992); *People v. Keith*, 21 Misc. 3d 1143(A) (New York County 2008).

Because this tribunals finds that Respondent Musante lacked probable cause to search Cerda's vehicle, I find him Guilty of searching Kelvin Cerda's vehicle without a sufficient legal basis.

February 7, 2013 (Case No. 2014-11554, 2014-11559)

It is undisputed that on February 7, 2013, at approximately 1 AM, Respondent Lam was assigned as the anti-crime sergeant for the 110 Precinct. He was in plain clothes in an unmarked vehicle with Respondent Musante and Officer Carrieri. (Tr. 212). A car driven by Person A which belonged to Kelvin Cerda, had been circling the

blocks near Lamont Avenue and Elbertson Streets in Queens. The officers stopped the car. Respondents Lam and Musante, together with Officer Carrieri, approached the vehicle. Respondent Musante frisked Person A after he exited the car. Respondent Musante also took a pill bottle out of the car. After running the driver's name, they let him go without any arrest. (Tr. 266-67). Respondent Lam is charged with improperly stopping Person A without sufficient legal authority and Respondent Musante is charged with improperly frisking Person A and searching his vehicle.

Respondent Lam testified that the area around Lamont and Elbertson was a "problematic," high crime area where known gang members hang out. (Tr. 213). He further stated that drug crimes, robberies and other violent crimes have occurred there. (Tr. 213). He also knew that there was an existing pattern in the area at around the same time of night for "strong-arm robberies." (Tr. 215).

Respondent Lam asserted that on February 7, 2013, he observed Person A drive around the block several times and noticed that the vehicle slowed down several times when it passed by pedestrians. He started to follow the car and observed that it did not slow down when it passed open spaces, so it did not appear the driver was looking for parking. (Tr. 213-15). Respondent Lam, after observing the car slow down several times over several minutes, thought the driver was "looking to case a victim, maybe commit a crime," which led to the officers' decision to stop the vehicle (Tr. 216-18, 228).

Respondent Musante echoed Respondent Lam's testimony about the events leading up to the stop. (Tr. 260-63). He further testified that while he was standing by the driver's side door, when Person A opened the glove box to get out his license, registration and insurance, he noticed a prescription pill bottle. (Tr. 276). He further

stated that his suspicion was raised when Person A told him he was just going home

after he had observed Person A circle the block three times.

He asked Person A to step out of the vehicle and, in fear for his safety, he frisked him. (Tr. 265). He testified that the reasons he frisked Person A on the basis that it was a high crime area; there were people on the streets; Person A circled the block three times without parking and his answer that he was just going home, which caused Musante to "question his conduct." (Tr. 265, 284). Respondent Musante then reached into the car to retrieve the pill bottle that he had observed in the glove compartment, which was still open. (Tr. 266, 314). The bottle was a prescription bottle of OxyContin, once again bearing the name "██████████" on the label. (Tr. 281). He testified that he did no further search of the vehicle. (Tr. 266). He explained that because he recognized the pill bottle from when he had stopped Kelvin Cerda a few months previously, he did not arrest Person A and simply gave him a verbal warning. (Tr. 266-67).

Person A did not appear to testify. In his statement to CCRB, he said he was driving home, looking for a parking space that night when the police officers stopped him just as he was backing into a spot. (CCRB Ex. 1B, 63-64). He further stated that he was asked to step out of the vehicle, frisked and that the officers found two pill bottles belonging to his brother's ex-girlfriend in the car. (CCRB Ex. 1B, 65).

Analysis

Respondent Musante has been charged with frisking Person A and searching his vehicle without sufficient legal authority. Respondent Lam has been charged with stopping Person A's vehicle without sufficient legal authority.

There is no question that Person A was stopped. Under the Patrol Guide, a stop may be conducted only when a police officer has an individualized reasonable suspicion that the person stopped has committed, is committing, or is about to commit a felony or Penal Law misdemeanor. (P.G. 212-11, p.2).

In this case, I find that Respondent Lam, who testified in a straightforward and forthright manner about the night in question, did have an individualized reasonable suspicion to stop Person A. Prior to the stop, Respondent Lam had information that this particular area was an area where there had been a pattern of strong-arm robberies. Based on his testimony that he saw the car circling the block numerous times and only slowing when near pedestrians and not slowing where there were possible parking spaces, Respondent Lam could reasonably suspect that the driver of the vehicle was casing the pedestrians and looking for a victim to rob. Based on this reasonable suspicion, I find him Not Guilty of an unlawful stop.

With regard to Respondent Musante's actions, I find that he did not have a proper basis for either frisking Person A or reaching inside the vehicle to remove a pill bottle. He had no basis for a reasonable suspicion that Person A was armed and dangerous at the time of the frisk. While the behavior of driving around and possibly casing victims was sufficient to allow the officers to stop and inquire, after their inquiry, they did not have enough information to support a reasonable suspicion that Person A was about to commit a violent crime or was in possession of a weapon. I therefore find Respondent Musante Guilty of the unlawful frisk as set forth in Specification 2.

With regard to Respondent Musante's reaching inside the car to retrieve the pill bottle, I note preliminarily that such an intrusion into Person A's vehicle, albeit brief

in both time and scope, constitutes a search under the Fourth Amendment. See *N.Y. v.*

Class, 475 U.S. 106 (1986) (holding that a police officer's reaching into the automobile's interior and moving papers so that he could see the automobile's VIN number constituted a search for Fourth Amendment purposes). This tribunal does not find that the pill bottle created sufficient probable cause for Respondent to reach into the vehicle, thereby infringing upon Person A's Fourth Amendment rights. As noted in this discussion of the November 30 incident, a labeled pill bottle is not inherently suspicious or threatening and there was not testimony that Respondent Musante was able to immediately identify the pills as a controlled substance. This tribunal finds that the information available to Respondent Musante prior to the search did not create a reasonable basis for him to determine the pill bottle was evidence of criminality or contraband. Therefore, the mere observation of the prescription bottle could not serve as the sole basis for probable cause for the search. See *Carbone*, 184 A.D.2d 648 (2d Dep't 1991); *Keith*, 21 Misc. 3d 1143(A). Finally, I note that the fact that Person A's vehicle was stopped in a high-crime area is not a sufficient basis to justify a search. *People v. Ocasio*, 119 A.D.2d 21 (1st Dep't 1986). As such, Respondent Musante is found Guilty of Specification 3.

PENALTY

November 18, 2012 incident (Case No. 2014-11553 & 2014-11557)

In order to determine an appropriate penalty, Respondent Jennings' and Respondent Lazarou's service records were examined. See *Matter of Pell v. Board of Education*, 34 NY.2d 222 (1974). Respondent Jennings was appointed to the Department on July 1, 2002. Respondent Lazarou was appointed to the Department on January 10,

2005. Information from their personnel records that was considered in making their penalty recommendations is contained in an attached confidential memorandum.

Both Respondents have been found guilty of frisking an individual without sufficient legal authority. The CCRB seeks a penalty of five vacation days.

Having considered all relevant circumstances, this tribunal finds three vacation days to be a reasonable and appropriate penalty. Neither Respondent Jennings nor Respondent Lazarou has any prior formal disciplinary adjudications. In the case of Respondent Jennings, the CCRB asked for five vacation days for two specifications and he was only found Guilty of one specification. Further, such a penalty is consistent with recent Department precedent for improper frisks. *See Case No. 2014-12473* (September 21, 2015) (nine-year detective with no prior disciplinary record forfeited three vacation days for frisking complainant without sufficient legal authority. ADCT found Respondent's reasoning that he saw a "bulge" that could have been a weapon provided insufficient basis as any bulge "could" be a weapon); *Case No. 2014-12398* (June 22, 2015) (seventeen-year detective with no prior disciplinary record forfeited three vacation days for frisking two complainants without sufficient legal authority where Respondent's testimony did not provide justifiable reasons to conclude that anyone was in danger of physical injury at the time of the frisks).

For these reasons, I recommend that Respondent Lazarou and Respondent Jennings forfeit three vacation days each.

POLICE OFFICER DANIEL JENNINGS
DETECTIVE JEFFREY ARCEO
SERGEANT JOHN MUSANTE
SERGEANT MICHAEL LAZAROU
SERGEANT SIU LAM

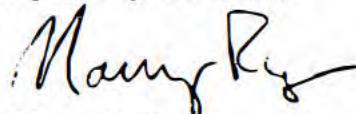
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November 30, 2012 & February 7, 2013 incidents (Case No. 2013-10310 & 2014-11554)

In order to determine an appropriate penalty, Respondent Musante's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent Musante was appointed to the Department on January 20, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent Musante has been found Guilty of two improper vehicle searches and an unlawful frisk. The CCRB seeks a penalty of seven days. Said penalty is consistent with recent Department precedent. *Case No. 2013-9777* (July 27, 2015) (eighteen-year police officer forfeited six vacation days for frisking complainant and searching his vehicle without sufficient legal basis); *Case No. 2013-9642* (December 12, 2014) (nine-year police officer forfeited seven vacation days for his role in frisk and search of complainant search where there was no reasonable suspicion of physical danger to justify frisk or probable cause to justify search). Accordingly, I recommend Respondent Musante forfeit seven vacation days.

Respectfully submitted,



Nancy R. Ryan

Assistant Deputy Commissioner – Trials

APPROVED

FEB 18 2016
WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DANIEL JENNINGS
TAX REGISTRY NO. 930416
DISCIPLINARY CASE NO. 2014-11553

Respondent was appointed to the Department on July 1, 2002. His last three annual performance evaluations were 4.5 overall ratings of "Highly/Extremely Competent" from 2012 - 2014. He has three medals for Excellent Police Duty and one medal for Meritorious Police Duty. Respondent has no prior formal disciplinary history.



For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner - Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT MICHAEL LAZAROU
TAX REGISTRY NO. 936922
DISCIPLINARY CASE NO. 2014-11557

Respondent was appointed to the Department on January 10, 2005. His last three performance evaluations were 4.5 overall ratings of "Highly/Extremely Competent" from 2012- 2014. He has twelve medals for Excellent Police Duty and one medal for Meritorious Police Duty. He has no prior former disciplinary history.



For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT JOHN MUSANTE
TAX REGISTRY NO. 934019
DISCIPLINARY CASE NO. 2013-10310, 2014-11554

Respondent was appointed to the Department on January 20, 2004. His last three performance evaluations were a 5.0 overall rating of "Extremely Competent," 4.5 rating of "Extremely/Highly Competent," and a 4.0 rating of "Highly Competent." He has six medals for Excellent Police Duty. He has no prior former disciplinary history.



For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner – Trials